Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No, _____

IN THE

SUPREME COURT OF THE UNITED STATES

GEOFFREY WILLARD ATWELL, PETITIONER

vs.

MARK S. SCHWEIKER, et al., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Geoffrey Willard Atwell
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QUESTIONS PRESENTED

I. Is illegal incarceration a continuing offense until the inmate is discharged from prison in order for the inmate to commence a 42 USC Section 1983 Civil Action with the Statute of Limitations for a State/Commonwealth tolled until the inmate is discharged from prison?

II. When an inmate charges being illegally incarcerated beyond the judicially imposed sentencing, are an inmate's administrative remedies completed upon filing a prison grievance process or, is an inmate able to pursue additional remedies with States'/Commonwealths' officials who have the capability of instituting investigation and/or prison discharge as part of the administrative remedy process?

III. Is a State/Commonwealth sentencing statute Constitutional when State/Commonwealth Court imposes, upon conviction, consecutive sentences that increase the total sentence after the inmate has begun the imposed sentencing, especially when pre-trial incarceration is credited for part of the sentence?

LIST OF PARTIES

All parties do not appear in the Caption of the case on the Cover Page and therefore, below is a list of all Parties to the proceedings in the Court where Judgment is the subject of this Petition:

1. Mark S. Schweiker
2. Edward G. Rendell
3. Judith B. Selvey
4. Sarah Hart
5. Randy Sears
6. Michael Farnan
7. Thomas Corbett, Jr.
8. James O. Thomas, Jr.
9. Gregory R. Neuhauser
10. R. Douglas Sherman
11. Robert A. Greevy
12. Attorney General D. Michael Fisher

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the below judgment:

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Third Circuit appears at Appendix B. to this Petition and is unpublished.

2. The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania appears at Appendix E. and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit filed their decision on my case was September 17, 2009.

A timely Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Third Circuit on November 6, 2009 and a copy of the filing denying rehearing appears at Appendix A.

The Jurisdiction of this Court is invoked under 28 USC Section 1254. (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. **USCA Amendment 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service at time of war or public danger; nor should any person be subject for the same offence to be twice put in jeopardy of life and/or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. **USCA Amendment 8**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted.

III. **USCA Amendment 14, Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law

STATEMENT OF THE CASE

1. Petitioner was unconditionally discharged from the Pennsylvania Department of Corrections (Pa DOC) State Correctional Institution Dallas (SCI Dallas) May 22, 2004 and subsequently executed, on May 19, 2006, and served, on May 20, 2006, a 42 USC Section 1983 civil action on Respondents in the United States District Court for the Middle District of Pennsylvania (MDC) that was docketed 1:CV06-1048 and filed May 23, 2006 and Petitioner claimed that Respondents' violated Petitioner's Civil Rights guaranteed by USCA A.5., USCA A.8. And USCA A.14. by denying Petitioner his vested liberty interest from May 22, 2002 (subsequently modified to October 19, 2002) to May 22, 2004.

2. Petitioner's Complaint, Docketed 1:CV06-1048, was based upon Petitioner's calculations of his consecutive sentencing by the Court of Common Pleas of the 51st Judicial District of Adams County, Pennsylvania (Appendix E.) commencing October 20, 1998 but, prior to Petitioner's receipt of a copy of the actual 51st Judicial District Court of Common Pleas of Adams County, Pennsylvania sentencing orders (Appendix E.) as obtained through Discovery for 1:CV03-01728 (CA3 Appeal Docket #08-2228), Petitioner claimed that his consecutive sentences were completed May 22, 2002 and not as per PaDOC calculations that listed May 22, 2004 as Petitioner's completion date (Appendix E.). (Pursuant receipt of a copy of the actual sentencing orders, Petitioner

recalculated his sentencing and modified completion date from May 22, 2002 to October 19, 2002

3. Based upon 1. and 2. above, Petitioner has argued with CA3 and MDC that his 42 USC Section 1983 Complaint was timely filed and argues below reasons for granting this Petition for Writ of Certiorari and claims that Petitioner's Constitution Rights, pursuant USCA A.s 5, 8 and 14, have been denied Petitioner.

REASONS FOR GRANTING THE WRIT

1. Petitioner Executed 42 USC Section 1983 Complaint based upon denial of his absolute liberty interest due October 19, 2002, pursuant USCA A. 5 and A. 14, as Respondents refused to respond and/or acquiesced to Petitioner's written request to each Respondent concerning Petitioner's illegal increase of sentencing at Pa DOC, SCI Dallas and after Petitioner completed Pa DOC Grievance Procedure, Petitioner was not provided relief and for which this 42 USC Section 1983 Civil Action was filed in the United States District Court for The Middle District of Pennsylvania (MDC), and for which this Civil Action Appeal was Filed May 23, 2006 and Docketed No. 1:CV06-1048.

2. When Petitioner filed this Civil Action Appeal, Docket 1CV06-1048, Petitioner only had available his sentencing timing per Pa DOC and based upon those consecutive amounts, Petitioner's Civil Action claimed the initial conception date as May 22, 2002 but, during Petitioner's Discovery requests for 1:CV03-01728 (CA3 Appeal Docket #08-2228-pending), Petitioner received copies of his actual sentencing orders by the Sentencing Judge for the 51st Judicial Court of Common Pleas of Adams County, Pa, Appendix E, and Petitioner

recalculated his sentences and ascertained that his maximum unconditional discharge date after completing the imposed consecutive sentences, Appendix E., was October 19, 2002 and not May 22, 2004, and after Petitioner's attempted Pa DOC administrative grievance remedy was denied, Petitioner wrote Respondents, each, whom acting individually, had the capability to institute relief for Petitioner, Petitioner filed this Civil Action in MDC. Petitioner attempted Discovery in the MDC, but was denied. Petitioner executed and served on February 27, 2009 a Brief Opposing Defendants' Pretrial Motion to Dismiss, complete with (17) Exhibits that contained factual data for determination of Petitioner's judicially imposed sentences and timing, but MDC filed a Memorandum and Order April 2, 2009, Appendix D, which denied Petitioner's Petition and dismissed this Civil Action. Petitioner therefore filed an Appeal and Motion for Leave to Proceed in Forma Pauperis with CA3 and was granted leave to proceed in forma pauperis, and, although Petitioner filed a Motion Not to Dismiss, CA3 filed Opinion and Judgment, Appendices B. and C. affirming the

MDC Memorandum and Order, Appendix D., and CA3's affirmation was based only on stating that Petitioner's "action was untimely". Petitioner filed a Petition for a Rehearing En Banc but was denied, Appendix A.

3. Petitioner's inherent reasoning for filing a Civil Action was based upon his being illegally incarcerated October 19, 2002 to May 22, 2004 claiming that Respondents' allowed for an illegal increase in Petitioner's judicially imposed sentencing and Petitioner charges that Appendix E. constitutes Proof for Petitioner's complaint. Furthermore, Petitioner charges that 42 Pa CSA Section 9757, Appendix F., is unconstitutional as it violates USCA A. 5., and USCA A. 14. as applied to the states and for which also constitutes a violation of USCA A. 8., as 42 Pa CSA Section 9757 promulgates increases in sentencing for consecutive sentences once a series of consecutive sentences commence.

4. Based upon the foregoing, Petitioner researched cases and statutes citing a continuing wrong theory as grounds for Petitioner to limit his civil action filing until his unconditional Pa DOC SCI Dallas discharge on May 22, 2004 and for which Petitioner executed this civil action on May 19, 2006 and served on May 20, 2006 and is timely pursuant 42 Pa CSA Section 5524 and 42 USC Section 1988.

A. Pursuant Wilson, et al. v. Garcia, 471 U.S. 261 (1985), and Annotation 85 L. Ed. 2d 899, it was held that:

i. Under 42 USC Section 1988, characterization of a 42 USC Section 1983 claim for statute of limitations purposes are governed by Federal rather than State law where State law governs length of limitations period relating questions of tolling and application.

ii. 42 USC Section 1988 mandates the selection in each State of the most appropriate statute of limitations for all 42 USC Section 1983 claims rather than the use of various statutes depending upon an evaluation of the factual circumstances and legal theories in individual cases and,

iii. 42 USC Section 1983 claims are best characterized as personal injury actions for statute of limitations purposes and, Petitioner had personal injury for this complaint and Petitioner's letters to Respondents' are additional sources seeking relief.

B. The Commonwealth of Pennsylvania Statute 42 Pa CSA Section 5524 cites a (2) year statute of limitations for personal injury lawsuits and should toll as a continuing wrong as evidenced per Reeser v. Cabot Corp., 223 F. Supp. 2d 644, E.D. (Pa) 2002, reconsid. den. 2002 WL 31163610, and the discovery rule can toll as, despite due diligence, this Petitioner couldn't

know his final injury(ies), from other inmates, etc., or cause and, per City of Philadelphia v. Lead Industries Ass'n., Inc., 994 F. 2d 112, CA3 (Pa) 1993, Petitioner couldn't show or know what could or would happen to him October 19, 2002 to May 22, 2004. Petitioner was diligent with investigation to Respondents but, Respondents failed to respond and/or acquiesced to Petitioner's letters and Petitioner did not know what might happen to him prior to unconditional discharge May 22, 2004 in a violent environment of a prison and therefore, time should be tolled and the May 22, 2006 service of this civil action was timely: Re: Foulke v. Dugan, 187 F. Supp. 2d 253, E.D. (Pa) 2002.

C. Per Dawnbrowski v. Gould Electronics, Inc., 954 F. Supp. 1006, M.D. (Pa) 1996, the Court should address the ability of a damaged party before applying discovery rule and this was not done for Petitioner's action.

D. The continuing wrong doctrine did not apply to tolling limitation of actions per Sameric Corp. of Delaware, Inc. v. City of Philadelphia, 142 F. 3d 582, 599,CA3 (Pa) 1998 as possible injury(ies) were not known but, in Petitioner's action, Petitioner claims he suffered injury with loss of liberty interest October 19, 2002 to May 22, 2004 and which is known but, the total extent of Petitioner's injury(ies) in a violent environment weren't totally known and Petitioner charges that Respondents'

continuing wrong of illegal incarceration should toll statutes of limitations decision and this is contrary to Sameric, id. As the continuing wrong accrues every day that violations of Petitioner's civil rights exists and tolls till stopped and, Heck v. Humphrey, 512 U.S. 477 (1994) is not applicable as Petitioner's sentence was completed October 19, 2002 (Re: Appendix E.)

E. Under the continuing violation theory, a new claim occurs each day violation is extant and continuing violation applies when conduct is on-going rather than in a single event, as was each day of Petitioner's illegal incarceration from October 19, 2002 to May 22, 2004, per Interamericas Investments, Ltd. V. Board of Governors of the Federal Reserve System, 111 F. 3d 376, CA5 (1997).

F. Commonwealth of Pennsylvania's 42 Pa CSA Section 5524 (2) year statute of limitations in IDEA action begins to run when state administrative process has run its course, per Jeremy H. by Hunter v. Mount Lebanon School District, 95 F. 3d 272, CA3 (Pa) 1996 and Petitioner's State administrative process ran its course May 22, 2004.

G. Per Barnes v. American Tobacco Co., 161 F. 3d 127, 157, CA3 (Pa) 1998, Petitioner was not aware of all possible alleged injury from his claimed period of illegal incarceration from

October 19, 2002 to May 24, 2004 and therefore, the discovery rule for possible injury tolls during Petitioner's complete inability (due to illegal incarceration) despite his exercise of due diligence, e.g. letters to Respondents.

H. Per Fowkes v. Pennsylvania Railroad Company, 264 F. 2d 397, CA3 (Pa) 1959, Petitioner experienced a continuing wrong when he is unable to anticipate injury discovery from October 19, 2002 to May 22, 2004 until the time it occurs and therefore, May 20, 2006 service of Complaint, docketed 1:CV06-1048, was timely for May 22, 2004 discharge from Pa DOC SCI Dallas for Petitioner could have experienced injury while imprisoned up to May 22, 2004.

I. Per Urie v. Thompson, 337 U.S. 163 (1949), there is no definite meaning of the word accrued.

J. Per Kichline v. Consolidated Rail Corp., 800 F. 2d 356, 360, CA3 (Pa) 986, vacated and remanded, injury or time must be provided.

K. Per the Clayton Act and 14 L. Ed. 2d 405, limitation of actions is tolled and personal injury allows filing of 42 USC Section 1983 action per 104 L. Ed. 2d 582.

L. Per Toussie v. U.S., 397 U.S. 112 (1970), the statute of limitations begins to run against a criminal prosecution when crime is complete, i.e. Petitioner's illegal incarceration completed May 22, 2004 and, this indicates the doctrine of continuing offenses.

M. A conspiracy, for which Petitioner considers his illegal incarceration to be, continues as long as the conspirators' engage in overt acts in furtherance of their plot, their plot being in the nature of a conspiracy that each days' act bring a rendered threat of the substantive evil, which is illegal incarceration and an evil for which Congress sought to prevent and Petitioner charges that the continuing offense of his illegal incarceration October 19, 2002 to May 22, 2004, even though Petitioner individually wrote a letter to each Respondent, is that of Petitioner's incarceration beyond the imposed sentencing, for which Petitioner charges Respondents' with conspiracy against Petitioner pursuant failure to respond and/or acquiesce to Petitioner's correspondence that had the effect of continuing Petitioner's illegal incarceration in a criminal purpose and as per Pettibone v. U.S., 146 U.S. 197 (1893), Aikens v. Wisconsin, 195 U.S. 194 (1904) and Grenada Lumber Co. v. Mississippi 217 U.S. 433 (1910). A conspiracy may not necessarily be the conception and purpose of the moment but, the conspiracy may be continuing as Pettibone,

supra, and Petitioner charges that Respondents' so continued keeping Petitioner illegally incarcerated to May 22, 2004 and, per Schneider and Hyde v. Borden Co., 303 U.S. 188 (1939) and Fiswick v. U.S., 329 U.S., 329 U.S. 211 (1946).

N. Petitioner's facts were not obscure by passage of time as Petitioner advised each Respondent via letter, and Petitioner was harmed October 19, 2002 to May 22, 2004 until Petitioner's unconditional discharge May 22, 2004 but as this Court denied Certiorari for Petitioner's Pennsylvania Private Criminal Complaints, 164 L. Ed. 2d 72 (2005), 168 L. Ed. 2d 710, 798 (2007)and 173 L. Ed. 2d 579 (2009), and Respondents of this action were defendants' for those actions, id and supra, and Respondents' were committing violations of Commonwealth of Pennsylvania Title 18 criminal acts on Petitioner as result of the aforementioned illegal incarceration and for which Petitioner claims a timely filing of 1:CV06-1048 as served May 20, 2006; based upon unconditional discharge from Pa DOC SCI Dallas May 22, 1004.

O. Petitioner is not required to pursue remedies when those remedies are so inadequate as to bring them within the "futility doctrine", as per Daniels v. Area Planning Commission of Allen City, 396 F. 3d 445, CA7 (2002).

Litigants filing prison condition actions after release from prison are no longer prisoners for purposes of remedy exhaustion requirements per Greig v. Goord, 169 F. 3d 165, CA2 (1999) (this should also mean that Heck v. Humphrey, supra, should not be considered in this instance as Petitioner was not a legal prisoner as Petitioner proves completion of judicially imposed sentencing) and, a prisoner means any incarcerated or detained person (as was Petitioner illegally October 19, 2002 to May 22, 2004), who is accused of, convicted or sentenced for or adjudicated delinquency for violations of criminal law or time, or conditions of probation and/or parole, etc. per 42 USC Section 1997 e(h) but, Petitioner was not in any one of the aforementioned

Q. A state statute tolls the state of limitations on state law claims per Tomkins v. Village of Tinley Park, 651 F. Supp. 50, N.D. (Ill) 1986, affm'd. 840 F. 2d 20, CA7 (Ill) 1988 but, the Commonwealth of Pennsylvania relies upon United States Statues and case precedents.

R. When Respondents' conduct is part of a concurring practice, a Civil Action is timely as the last act evidencing the confirming practice tolls within the limitation period and, as Petitioner was unconditionally discharged May 22, 2004, May 20, 2006 continues and in such instance, the Court should grant relief for the earlier related acts that would otherwise be time barred per Brenner v. Local 514,

United Brothers of Carpenters and Joiners of America, 927 F. 2d 1283, CA3 (Pa) 1991 and the Third Circuit Court should have granted Petitioner timeliness.

S. A cause of action for continuing injury accrues only when the wrong terminates, e.g. Petitioner discharged May 22, 2004, per Stuebig v. Hammel, 446 F. Supp. 31, M.D. (Pa) 1972 and the MDC should have applied this case to Petitioner's action.

T. The continuing claims doctrine applies, for limitations purposes, when the government owes a continuing duty to the individual, Petitioner in this instance; so that, in such cases, each time the government breaches that duty, as done to Petitioner each day from October 19, 2002 to May 22, 2004, and a new cause of action arises each day as Petitioner has so charged with being denied liberty freedom until the unconditional discharge May 22, 2004 and each day is a new cause and the Pennsylvania (2) year statute of limitations commenced May 22, 2004 and for which service of this civil action May 20, 2006 is timely per Boling, et al. v. U.S., 220 F. 3d 1365, CA Fed. (2000) and Hatter et al. v. U.S., 203 F. 3d 795, CA Fed. (2000).

U. The exhaustion dismissal citing failure to exhaust remedies is not required when the harm imposed on Petitioner October 19, 2002 to May 22, 2004 by exhausting would have been irreparable per Bowen v. City of New York, 476 U.S. 467 (1981).

V. Per Mitchell v. Hendricks, et al., 431 F. Supp. 1295, E.D. (Pa) 1977, for civil rights, the date when accruals are governed by Federal standards is when Petitioner knows or has reason to know of the injury which is the basis of the action but, in this case, Petitioner did not know if the letters sent to Respondents would result in an earlier timely discharge prior to May 22, 2004 and, acts repugnant to USCA A. 8 are those with punishments incompatible with evolving standards of decency and causing unnecessary wanton infliction of pain as caused Petitioner October 19 2002 to May 22, 2004.

W. Petitioner knew that he was to be discharged on May 22, 2004, even though Petitioner charges that date as illegal and for which this action was filed on Respondents May 23, 2006 (Petitioner executed on May 19, 2006 and served May 20, 2006) and Petitioner charges that accrual time commences May 22, 2004, pursuant letters to Respondents, and that they were not responded to and/or acquiesced and Petitioner complies with Cox v. Stanton, 529 F. 2d 47, 50, CA4 (1975) and Young v. Clinchfield Railroad Co., 288 F. 2d 499, 503, CA4 (1961).

X. Failure to discharge Petitioner October 19, 2002 constitutes a significant harmful indifference to serious liberty needs that were denied and is in violation of the standard of decency and complies with Estelle v. Gamble 429 U.S. 97 (1976) and filing date tolls per Mitchell v. Hendricks, supra.

Y. The nature of this action did not accrue until permanent effects May 22, 2004 per Urie v. Thompson, supra, Young v. Clinchfield, supra and Farmer v. Pennsylvania Railroad Co., 311 F. Supp. 1074, W.D. (Pa) 1970.

Z. Petitioner showed cumulative effect of discriminating effect per Hendrickson v. Potter, 327 F. 3d 444, CA5 (2003), cert. den. 157 L. Ed. 2d 432 (2003)

A1. Petitioner's experience of a continuous tort is of a wrongful act continuing or repeated and the statute of limitations runs from the end of the continuing wrongful conduct; which in this action is illegal incarceration from October 19, 2002 to May 22, 2004 as per Anderson v. State, 88 HAW 241, 965 P. 2d 783 (HAW Ct. App 1998) and Wilson v. Wal-Mart Stores, 159 NJ 963, 729 A. 2d 1006, 76 LAB CA3 (CCH) 946063 (1998).

A2. Under the continuous tort doctrine, recovery may be had for all damages occurring within the Statutory period before the action per Anderson v. State, supra and Bank of Ravenswood v. City of Chicago, 307 Ill App 3d 161, 740 Ill DEC 385, 717 N.E. 2d 478 (1st Dist. 1999), rehg. Den. (9/15/99).

A3. Under general common-law tort principles with respect to limitation of actions, it is the standard rule that accrual occurs when the Petitioner has a complete and present cause of action, i.e. when Petitioner can file such for obtaining relief per Wallace v. Kato, 549 U.S. 384 (2007) and also, the statute of limitations on a claim of false imprisonment begins to run when the alleged false imprisonment ends.

CONCLUSION

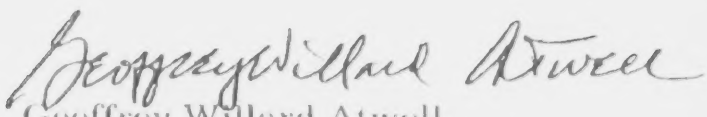
Decisions for this Civil Action by the Middle District Court and the Third Circuit Court conflict with case precedents by this Court and their own prior decisions.

Pursuant Petitioner's foregoing reasons with supporting cases and the copies of the51st Judicial District Court of Common Pleas of Adams County, Pennsylvania sentencing orders and Commonwealth of Pennsylvania sentencing statutes Petitioner proves that his maximum discharge date should have been October 19, 2002 and not May 22, 2004 and this Court's case decision Wallace v. Kato, 549 U.S. 384 (2007) rules that Petitioner was timely with his May 20, 2006 Service of Complaint for this action as Petitioner's Statute of Limitations for false imprisonment begins to run when the alleged false imprisonment ends, May 22, 2004 for this action, and under genuine common-law tort principles with respect to limitation of actions, it is the standard rule that accrual occurs when the Petitioner has a complete and present cause of action, i.e. when Petitioner can file suit to obtain relief and based upon the Commonwealth of Pennsylvania's (2) statute of limitations, per 42 Pa CSA Section 5524, Petitioner's service of May 20, 2006 was timely.

Therefore, Petitioner charges that his above "Reasons....." prove Respondents' denied Petitioner's liberty interests of USCA A. 5 and A. 14 and also inflicted cruel and unusual punishment of Petitioner in violation of USCA A. 8 and Petitioner

respectfully requests this Court to grant Certiorari for this Action.

Respectfully Submitted,



Geoffrey Willard Atwell,
Pro Se Petitioner

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E.	Sentencing Orders of 51st Judicial District Court of Common Pleas of Adams County, Pennsylvania	(14)
F.	Commonwealth of Pennsylvania Sentencing Statute 42 Pa C.S.A. Section 9757	(1)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2329

GEOFFREY WILLARD ATWELL,
Appellant

v.

MARK S. SCHWEIKER; EDWARD G. RENDELL; JUDITH B. SELVEY; SARAH HART, Pennsylvania Department of Corrections Chief Counsel; RANDY SEARS, Pennsylvania Department of Corrections D, Pennsylvania Deputy Chief Counsel; MICHAEL FARNAN, Pennsylvania Department of Corrections Assistant Chief Counsel; THOMAS CORBETT, JR.; JAMES O. THOMAS, JR., GREGORY R. NEUHAUSER; R. DOUGLAS SHERMAN; ROBERT A. GREEVY;and ATTORNEY GENERAL D. MICHAEL FISHER

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

APPENDIX A.

Present: SIRICA, Chief Judge,
SLOVITER, McKEE, BARRY, AMBRO,
FUENTES, SMITH, CHAGARES,
JORDAN, and HARDIMAN,
Circuit Judges

The petition for rehearing filed by appellant n the above-entitled case having been submitted to the judges who participated in t he decision of this court and to all other available circuit judges of the circuit in the regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for re-hearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: November 6, 2009

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

09-2329

GEOFFREY WILLARD ATWELL,
Appellant

v.

MARK S. SCCHWEIKER; EDWARD G. RENDELL; JUDITH B. SELVEY; SARAH HART, Pennsylvania Department of Corrections Chief Counsel; RANDY SEARS, Pennsylvania Department of Corrections Deputy Chief Counsel; MICHAEL FARNAN, Pennsylvania Department of Corrections Assistant Chief Counsel; THOMAS CORBETT, JR.; JAMES O. THOMAS, JR.; GREGORY R. NEUHAUSER; R. DOUGLAS SHERMAN; ROBERT A. CREEVY and ATTORNEY GENERAL D. MICHAEL FISHER

APPENDIX B.

On Appeal from the United States District Court For the Middle District of Pennsylvania
(D.C. Civil No. 06-cv-010480
District Judge: Honorable Sylvia H. Rambo

Submitted for Possible Dismissal Pursuant to 28 U.S.C. Sect. 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

September 17, 2009

Before: SLOVITER, FUENTES and JORDAN,
Circuit Judges

(Opinion filed: September 29 2009)

OPINION

PER CURIAM

Geoffrey Atwell appeals the District Court's order granting appellees' motion to dismiss his complaint. For the reasons below. we will affirm.

The procedural history of this case and The details of Atwell's claims are well known to parties and need not be discussed at length. Briefly, Atwell filed a complaint pursuant to 42 U.S.C. Section 1983 alleging that appellees failed to investigate his claims that he was being held past the expiration of his maximum sentence. The District Court oncluded that Atwell's claims were barred by **Heck v. Humphrey**, 512 U.S. 477, 487 (1994), and by the statute of limitations. Atwell timely filed a notice of appeal.

We have jurisdiction under 28 U.S.C. Section 1291 .We need not address whether the complaint is barred by **Heck** be-cause we agree with the District Court that it was untimely. Claims brought pursuant to 42 U.S.C. Section 1983 are subject to the state statute of limitations for personal injury actions, **Wilson v. Garcia**, 471 U.S. 261, 266-67 (1985). In Pennsylvania, the statute of limitations for personal injury action is two years.

42 Pa C.S.A. Section 5524. A cause of action accrues when the plaintiff knows or has reason to know of the injury that constitutes the basis of the cause of the action. **Sameric Corp. of Delaware, Inc. v. City ofPhiladelphia,** 142 F.3d 582,599 (3rd Cir. 1998.

Atwell argues that his sentence should have expired on October 19, 2002. In his opposition to the appellees' motion to dismiss, Atwell argued that his com-plain was timely because he had to exhaust the administrative grievance process. In a grievance response dated January 9, 2003, a prison official explained the calculation of the sentence and informed Atwell that the maximum expiration date of his sentence was May 22, 2004. The Acting Chief Grievance Coordinator denied the final review of that grievance on June 30, 2005. Thus, by June 2003, Atwell had finished exhaustting his administrative remedies and knew that the prison officials had calculated the maximum expiration date of his sentences to be May 22, 2004. His complaint, postmarked 23d on May 20, 2006, was filed beyond the two-year statute of limitations.

Atwell argues that his complaint was timely filed within two years of his release from prison on May 22, 2004. Because Atwell knew of his alleged ontinuing wrong theory does not apply. See **Barnes v. American Tobacco Co.**, 161 F.3d 127, 154 (3rd Cir. 1998) ("We understand **Fowkes [v. Pennsylvania R.R. Co.**, 264 F. 2d **397 3**rd Cir. 1959)] to mean that continuing conductof defendant will not stop ticking of the limitations clock begun when plaintiff obtained requisite information. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy.") (quoting **Kichline v. Consolidated Rail Corp.**, 800 F. 2d 356, 360 (3rd Cir)).

Summary action is appropriate if there is no substantial question presented in the appeal. See Third Circuit LAR 27.4. For the above reasons, we will summarily affirm the District Court's order. See Third Circuit I.O.P. 10.6.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

09-2329

GEOFFREY WILLARD ATWELL,
Appellant

v.

MARK S. SCCHWEIKER; EDWARD G. RENDELL; JUDITH B. SELVEY; SARAH HART, Pennsylvania Department of CorrectionsChief Counsel; RANDY SEARS, Pennsylvania Department of Corrections Deputy Chief Counsel; MICHAEL FARNAN, Pennsylvania Department of Corrections Assistant Chief Counsel; THOMAS CORBETT, JR.; JAMES O. THOMAS, JR.; GREGORY R. NEUHAUSER; R. DOUGLAS SHERMAN; ROBERT A. CREEVY and ATTORNEY GENERAL D. MICHAEL FISHER

APPENDIX C.

On Appeal from the United States District Court For the Middle District of Pennsylvania

(D.C. Civil No. 06-cv-010480
District Judge: Honorable Sylvia H. Rambo

Submitted for Possible Dismissal Pursuant to 28 U.S.C. Sect. 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

September 17, 2009

Before: SLOVITER, FUENTES and JORDAN,
Circuit Judges

JUDGMENT

The cause came to be considered on the Record from the United States District Court for the Middle District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. Section 1915 (e)(2)(B) or summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on September 17, 2009. On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered April 2, 2009, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/**Marcia M. Waldron**.
Clerk

DATED: September 29, 2009

IN THE UNITED STATES DISRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil N0. 1-CV:06=1048

GEOFFREY WILLARD ATWELL

Plaintiff

v.

MARK S. SCHWEIKER; EDWARD G. RENDELL; JUDITH B. SELVEY; SARAH HART, Pennsylvania Department of Corrections Chief Counsel; RANDY SEARS, Pennsylvania Department of Corrections Deputy Chief Counsel; MICHAEL FARNAN, Pennsylvania Department of Corrections Assistant Chief Counsel; THOMAS CORBETT, JR.; JAMES O. THOMAS, JR.; GREGORY R. NEUHAUSER;

APPENDIX D.

R. DOUGLAS SHERMAN;
ROBERT A. GREEVY, and
ATTORNEY GENERAL D.
MICHAEL FISHER,

Defendants

MEMORANDUM AND ODER

On May 23, 2006, Plaintiff, Geoffrey Willard Atwell,filed an action pursuant to 42 U.S.C. Section 1983 against Defendants captioned above. The history of this case will not be recounted. Plaintiff alleges that he was kept incarcerated in a state prison from October 19, 2002 to May 22, 2004,which was beyond His calculated release date. He alleges violations of his Fifth, Eighth and Fourteenth Amendment rights. Plaintiff filed this complaint after his release fropriison and, therefore, does not seek release from prison but other relief including monetary damages. Plaintiff sues Defendants in their individual capacities and claims they refused to respond to his complaints about being illegally incarcerated from October 19, 2002 to May 22, 2004. Defendants seek dismissal of this suit, in part, because Plaintiff's complaint under Section 1983 is foreclosed by **Heck v. Humphrey**, 512 U.S. 477, 487 (1994) and **Willaims v. Consovoy**, 453 F. 3d 173 (3rd Cir. 2006).

In **Heck**, the Court stated:

> We hold that, in order to recover damages for allegedly Unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a Section 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court'sissuance of a writ of habeas corpus, 28 U.S.C. Section 2254.

Heck v. Humphrey, 512 U.S. @ 486.

In **Consovoy**, the Third Circuit stated that

> "....a state prisoner's Section 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages orequitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or in-ternal prison proceedings)-if success in that action would necessarily demonstrate the validity of the confinement or its duration."

Williams v. Consovoy, 453 F. 3d @ 177 (quoting **Wilkinson v. Dotson**, 544 U.S. 74, 81-82 (2005).

In **Torres v. Fauver**, 292 F. 3d 141 (3rd Cir. 2002), the court held

> "...that a favorable termination rule does not apply to claims that implicate only the conditions and,

not the fact or duration, of a prisoner's incarceration."

Id @ 143. The complaint in the instant action does not attack the conditions of confinement but directly implicates the fact of duration of confinement.

The instant case was filed by Plaintiff two years after he was released from prison. Thus, at the time Plaintiff filed the Section 1983 action, habeas corpus was not available to him. In **Mitchell v. Dept. of Corrections**, 272 F. Supp. 2d 464 (M.D. Pa. 2003), the court was presented with a Section 1983 action contesting the duration of confinement. The action was filed by a plaintiff while still confined. The **Mitchell** court, citing **Preiser v. Rodriguez**, 411 U.S. 475, 500 (1973), noted that a state prisoner's proper action to contest the calculation of a release date in federal court is a habeas corpus petition rather than an action pursuant to 43 U.S.C. Section 1983. This would apply to cases which also seek monetary damages, **Heck**, 512 U.S. @ 487-488.

In **Mitchell**, the court held that **Heck** applied because **Mitchell** was a prisoner when he filed his Section 1983 action and had the opportunity to satisfy the favorable termination requirement before his release. Plaintiff became aware of the alleged miscalculation from October 19, 2002,

when he was not released. Plaintiff could have, but did not, file a habeas petition. He had the opportuneity to satisfy the favorable termination requirement before his release. He thus avoided the exhaustion of state remedies requirement and the habeas statute of limitations. Allowing this Section 1983 action to proceed would undermine the habeas corpus process that is the required avenue to challenge the duration of custody.Plaintiff alleges that his complaint is not against the Pennsylvania Bureau of Probation and Parole or anyone who determined his length of incarceration and, therefore, **Heck** is not applicable. He claims that Defendants failed to respond to his requests to investigate or assist in his requests for release from confinement. Throughout his brief, Plaintiff complains about his loss of liberty because of his length of confinement, specifically his confinement from October 19, 2002 to May 22, 2004. In Plaintiff's brief in opposition to the motion to dismiss, he makes the following inquiry,

> "...why was Plaintiff incarcerated from October19, 2002 to May22, 2004?"

(Doc. 53 @ p. 11.) Thus, this is a complaint about the invalidity of confinement and **Heck** does apply.

Defendants also move to dismiss the Section 1983 action on the basis of the two-year statute of limitation. Defendants allege that the complaint should have been filed within two years of dates

from May 22, 2002 to November 2003. This case was not filed until May 23, 2006. However,if the violation I deemed to be continuing violation until May 22, 2003, then the statute of limitations would have expired on May 22, 2006. Thus, the complaint was filed one day late.

For the reason set forth above, **IT IS HEREBY ORDERED THAT**

1) Defendants' motion to dismiss is granted and the
2) captioned action is dismissed as to all defendants.
3) It is certified that any appeal from this order will be deemed frivolous and not taken in good faith.
4) The Clerk of Court shall close the file.

This court will not entertain any motions for reconsideration.

s/Sylvia H. Rambo
United States District Judge

Dated: April 2, 2009

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA

Criminal

Commonwealth CC-678-98

vs.

Geoffrey Willard Atwell

ORDER OF COURT

And now this 23rd day of November, 1998,The Defendant appeared with counsel for the purpose of sentencing on two charges of criminal mischief in violation of Section 3304 (a)(1) of the Crimes Code as charged in Citations P0016111-4 and M0006290-4.

The sentence of the Court is that the Defendant shall be incarcerated in the Adams County Prison for a period of 90 days on each charge to run consecutive for a total of 180 days effective October 20, 1998. The Defendant shall pay the costs and all other fees, fines and costs mandated by law, Local Rule of Court or Administrative Order of Court and restitution to Mary Wehler in the amount of $322.84 for damage done at her home and in amount of $182.39 for damage done to her vehicle.

APPENDIX E.-No. 1.

BY THE COURT,

s/John D. Kuhn, Judge

Paul Dean, Esq.

Farley Holt, Esq.

Alice K. Wooters, RPR
Official Court Reporter

IN THE COURT OF COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

Criminal

Commonwealth CC-522-99,

Vs.

Geoffrey Willard Atwell

ORDER OF COURT

And now this 8th day of November, 1999, the Defendant appeared with counsel for purposes of sentencing.The Sentence of the Court on Count one, false reports to law enforcement agencies under Section 4906(a) of the CrimesCode as a misdemeanor of the second degree is that the Defendant shall be incarcerated in the Adams County Prison for a period of no less than 3 nor more than 23 months. He shall pay a fine in the sum of $150.00,

APPENDIX E.-No. 2.

the costs, and all other fees, fines and costs mandateed by Law, Local Rule of Court or Administrative Order of Court.

The effective date of this sentence is April 20, 1999.The Court will impose no additional sentence with regard to Count two as the Court considers Count two merging with Count one.

BY THE COURT,

s/John D. Kuhn, Judge

Paul Dean, Esq.

Roy Keefer, Esq.

Alice K. Wooters, RPR
Official Court Reporter

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA

Criminal

Commonwealth	CC-522-99,
	CC-245-98,
Vs.	CC-458-98,
	Length of parole:
Geoffrey Willard Atwell	10 M., 23 D.
	Max. release date
	3-20-01
	File: Ofc.

BY THE COURT

And now this 19th day of April, 2000, Effective 4/19/00, so long as the Defendant complies with the rules and regulations of the Adams County Prison, the defendant is released on parole for the balance of his unexpired sentence(s) subject to the standard conditions and special conditions.

Defendant is release to any outstanding detainers lodged against the defendant.

Defendant is required to pay a $25.00 month supervision fee.

APPENDIX E.-No. 3.

On Count one, theft by unlawful taking in violation of Section 3921(a) of the Crimes Code as a misdemeanor of the third degree, the Defendant shall be incarcerated for a period of no less than one nor more than twelve months. On Count two, criminal mischief in violation of Section 3304(a)(1) of the Crimes Code as a summary offense, the Defendant shall be incarcerated for a period of 90 days. The effective date of each sentence in CC-245-98 is consecutive to the sentence imposed in CC-522-99 by Order of Sentence dated November 8, 1999. In this matter the Defendant is entitled to 38 days credit.

The Sentence of the Court in CC-458-98 is as follows: On Count three, recklessly endangering in violation of Section 2705 of the Crimes Code as a misdemeanor in the second degree, the Defendant shall be incarcerated for a period of no less than six nor more than 24 months. On Count four, stalking in violation of Section 2709(b)(2) of the Crimes Code as a misdemeanor of the first degree, the Defendant shall be incarcerated for a period of no less than six nor more than 24 months. On Count six, which is noted as Count five on the verdict form, intimidation of witness in violation of Section 4952 (a)(3) of the Crimes Code as a felon of the third degree, the Defendant shall be incarcerated for a period of no

less than 16 nor more than 36 months. Each of these counts shall be served concurrently with one another but consecutive to the sentence imposed this date in CC-245-98. It is noted that the Defendant is entitled to 24 days credit on these sentences.

In CC-754-98, the Sentence of the Court on Count one, harassment by communication in violation of Section 5504(a)(1) of the Crimes Code as a misdemeanor of the third degree is that the Defendant shall be incarcerated for no less than one nor more than twelve months. It is noted that Count two, harassment by comm.-unication, merges with Count one.

The Sentence of the Court on CC-97-99 is as follows: Count one, stalking in violation of Section 2709(b)(2) of the Crimes Code as a misdemeanor of the degree, the Defendant shall be incarcerated for a period of no less than six nor more than 24 months. On Count two, harassment by communication in violation of Section 5504(a)(1) of the Crimes Code as a misdemeanor of the third degree, the Defendant shall be incarcerated for a period of no less than one nor more than twelve months. Count three, harassment by communication merges with Count two.

All sentences imposed in CC-754-98 and CC-97-99 shall run concurrently with one another but shall be served consecutive to the sentence imposed in CC-458-98.

In each of the cases, the Defendant shall be subject to the same financial obligations imposed in the Order of April 11, 2000.

BY THE COURT,

s/John D. Kuhn, Judge

Paul Dean, Esq.

Farley Holt, Esq.

Alice K. Wooters, RPR
Official Court Reporter

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA

Criminal

Commonwealth CC-245-98, CC-458-98

Vs. CC-754-98, CC-97-99

Geoffrey Willard Atwell

ORDER OF COURT

And now this 22nd day of May, 2000, in consideration of Defendant's motion for modification of sentence wherein it appears that the Sentence of the Court entered April 11, 2000 was based upon an incorrect prior record score for the Defendant and that the correct prior record score is one instead of two and that all offense gravity scores were cor-rect, the Defendant's motion is granted as follows.

The Sentences entered on April 11, 2000 are modified in the following regard: The Sentence of the Court in CC-245-98 is as follows:

APPENDIX E.-No. 4.

BY THE COURT,

s/John D. Kuhn, Judge

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY, PENNSYLVANIA

Criminal

Commonwealth CC-1050-99

Vs.

Geoffrey Willard Atwell

ORDER OF COURT

And now this 22nd day of May, 2000, the Defendant appeared with counsel for purposes of Sentencing. The sentence of the Court on violation of Section 2703.1 of the Crimes Code as a felony of the third degree is that the Defendant shall be incarcerated in a State Correctional Institution for a period of no less than six nor more than 24 months. He shall pay the costs, a $100 fine and all fees, fines and costs mandated by law, Local Rule of Court or Administrative Order of Court. This sentence shall be served consecutive to the sentence imposed in CC-97-99.

The Defendant may be transpoted by the Sheriff of Adams County to the State Correctional Institution for purposes of executing this sentence.

APPENDIX E.-No. 5.

BY THE COURT,

s/John D. Kuhn, Judge

Paul Dean, Esq.

Roy Keefer, Esq.

Alice K. Wooters, RPR
Official Court Reporter

IN THE COURT OF COMMON PLEAS
OF ADAMS COUNTY PENNSYLVANIA

Criminal

Commonwealth CC-706-00

Vs.

Geoffrey Willard Atwell

ORDER OF COURT

And now this 20th day of March, 2001, the Defendant appeared with counsel for purposes of sentencing. The Sentence of the Court is that the Defendant shall be incarcerated in a State Correctional Institution for a period of no less than 3 nor more than 18 months, which sentence shall run consecutive to the sentence previously imposed in CC-1050-99.

The Defendant shall pay the costs of this proceeding, a $25 service fee, a $10 fee to the Adams County Law Enforcement Fund and all other fees, fines and costs mandated by Law, Local Rule of Court or Administrative Order of Court.

APPENDIX E.-No. 6.

The Court has determined that in light of Defendant's circumstances and period of incarceration imposed that no fine will be imposed.

It is ordered that a transcript of the trial held February 21, 2001 and the sentencing proceedings held March 20, 2001 hereby be transcribed and filed of record.

BY THE COURT,

s/John D. Kuhn, Judge

Michael George, Esq.

Roy Keefer, Esq.

Alice K. Wooters, RPR
Official Court Reporter

SENTENCING 42 Pa C.S.A. SECTION 9757

Section 9757, **Consecutive sentences of total confinement for muliple offenses**

Whenever the court determines that a Sentence should be served consecutively to one being then imposed by the court, or to one previously imposed, the court shall indicate the minimum sentence to be served for the total of all offenses with respect to which sentence is imposed. Such minimum sentence shall not exceed one-half of the maximum sentence imposed.

1974, Dec. 30, P.L. 1052, No. 345, Sect. 1, effective in 90 days.Amended 1980, Oct, 5, P.L. 693, No. 142, Sect. 401(a), effective In 60 days. (Ths section was transferred from 18 PaC.S.A.Section 1357 by the 1980 Act.)

APPENDIX F.